

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

TAVITA PULETU,

Plaintiff,

v.

THE FISHING COMPANY OF ALASKA,  
INC.,

Defendant.

CASE NO. C05-1752RSM

ORDER GRANTING DEFENDANT'S  
MOTION FOR SUMMARY  
JUDGMENT

**I. INTRODUCTION**

This matter comes before the Court on Defendant's renewed motion for summary judgment. (Dkt. #27). Defendant indicates that Plaintiff previously agreed that a pending analogous case in the Ninth Circuit would determine the outcome of this case. The Ninth Circuit has since rendered an opinion favorable to Defendant, and therefore Defendant now moves for summary judgment. Alternatively, Defendant argues that this Court should determine as a matter of law that Plaintiff's "prolongation of pain" claim is not an independent cause of action, thereby justifying its dismissal.

Plaintiff responds that Defendant's motion for summary judgment is untimely because the dispositive motion deadline in the instant case has passed. Plaintiff additionally argues that the analogous Ninth Circuit case does not affect the instant proceedings because this Court has previously found that triable issues of fact exist.

1 For the reasons set forth below, the Court agrees with Defendant, and GRANTS  
2 Defendant's motion for summary judgment.

## 3 **II. DISCUSSION**

### 4 **A. Background**

5 This Court previously granted in part and denied in part a motion for summary judgment  
6 brought by Defendant, the Fishing Company of Alaska, Inc., on September 13, 2007.<sup>1</sup> In that  
7 Order, the Court dismissed the majority of Plaintiff Tavita Puletu's claims with the exception of  
8 Plaintiff's "prolongation of pain" claim. In addition, although the deadline for discovery had  
9 passed, the Court reopened discovery with respect to that claim because Plaintiff had raised that  
10 claim for the first time in its response to Defendant's motion for summary judgment. However,  
11 prior to the amended discovery deadline set by the Court, Defendant moved to stay the  
12 proceedings on the grounds that an analogous case that was pending before the Ninth Circuit  
13 would determine the outcome of this case. Plaintiff did not oppose the motion, and the Court  
14 subsequently stayed the proceedings for six months on October 9, 2007. (Dkt. #26).  
15 Approximately five months later, the Ninth Circuit rendered its memorandum opinion in the  
16 analogous case. *See Baylor v. Icicle Seafoods, Inc.*, 2008 WL 636823 (9th Cir. March 7,  
17 2008). In *Baylor*, the Ninth Circuit affirmed the district court's summary judgment dismissal of  
18 a plaintiff seawoman's claims against her employer. Based on that ruling, Defendant now brings  
19 the instant motion for summary judgment.

### 20 **B. Summary Judgment Standard**

21 Summary judgment is proper where "the pleadings, depositions, answers to  
22 interrogatories, and admissions on file, together with the affidavits, if any, show that there is no  
23 genuine issue as to any material fact and that the moving party is entitled to judgment as a  
24 matter of law." Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247

---

26 <sup>1</sup> The Court has already discussed the specific facts that gave rise to Plaintiff's complaint in that  
27 Order. Accordingly, the Court finds it unnecessary to repeat those facts here.

(1986). The Court must draw all reasonable inferences in favor of the non-moving party. *See F.D.I.C. v. O'Melveny & Meyers*, 969 F.2d 744, 747 (9th Cir. 1992), *rev'd on other grounds*, 512 U.S. 79 (1994). The moving party has the burden of demonstrating the absence of a genuine issue of material fact for trial. *See Anderson*, 477 U.S. at 257. Mere disagreement, or the bald assertion that a genuine issue of material fact exists, no longer precludes the use of summary judgment. *See California Architectural Bldg. Prods., Inc., v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987).

Genuine factual issues are those for which the evidence is such that “a reasonable jury could return a verdict for the non-moving party.” *Anderson*, 477 U.S. at 248. Material facts are those which might affect the outcome of the suit under governing law. *See id.* In ruling on summary judgment, a court does not weigh evidence to determine the truth of the matter, but “only determine[s] whether there is a genuine issue for trial.” *Crane v. Conoco, Inc.*, 41 F.3d 547, 549 (9th Cir. 1994) (citing *O'Melveny & Meyers*, 969 F.2d at 747). Conclusory or speculative testimony is insufficient to raise a genuine issue of fact to defeat summary judgment. *Anheuser-Busch, Inc. v. Natural Beverage Distributors*, 60 F. 3d 337, 345 (9th Cir. 1995). In the context of a claim brought under the Jones Act, the “quantum of evidence necessary to support a finding of Jones Act negligence is less than that required for common law negligence . . . and even the slightest negligence is sufficient to sustain a finding of liability.” *Havens*, 996 F.2d at 218; *see also Lies v. Farrell Lines, Inc.*, 641 F.2d 765, 770-71 (9th Cir. 1981) (holding that a seaman must demonstrate only that his employer’s negligence played any part, even the slightest, in producing his injury). Courts should exercise special care in considering summary judgment in Jones Act cases which require a very low evidentiary threshold for submission to a jury. *Leonard v. Exxon Corp.*, 581 F.2d 522, 524 (5th Cir. 1978).

### **C. Dispositive Motion Deadline**

As an initial matter, the Court addresses Plaintiff’s argument that Defendant’s summary judgment motion is untimely. Plaintiff specifically argues that the instant motion is well past the August 7, 2007 dispositive motion deadline set forth by this Court. (Dkt. #15). However, it is

1 well-recognized that “a district court possesses the inherent power to control its docket and  
2 promote efficient use of judicial resources.” *Dependendable Highway Exp., Inc. v. Navigators*  
3 *Ins. Co.*, 498 F.3d 1059, 1066 (9th Cir. 2007) (citing *Landis v. North Amer. Co.*, 299 U.S. 248,  
4 254, 57 S.Ct. 163 (1936)); *see also Murray v. Laborers Union Local No. 324*, 55 F.3d 1445,  
5 1452 (9th Cir. 1995) (finding that “[d]istrict court judges must have ample discretion to control  
6 their own dockets”). Indeed, it is common for district courts to *sua sponte* extend deadlines.  
7 *See generally Ayala v. Anderson*, 2008 WL 110115, at \*1 (E.D. Cal. Jan. 8, 2008); *Phillips v.*  
8 *Beck*, 2007 WL 4392019, at \*7 (D. Hawai’i, Dec. 17, 2007); *Garrison v. Washington State*  
9 *Dept. of Corrections*, 2007 WL 4166141, at \*1 (W.D. Wash. Nov. 20, 2007).<sup>2</sup> In fact, district  
10 courts have the power to *sua sponte* grant summary judgment in certain circumstances. *See*  
11 *Portsmouth Square v. Shareholders Protective Comm.*, 770 F.2d 866, 869 (9th Cir. 1985);  
12 *Cool Fuel, Inc. v. Connett*, 685 F.2d 309, 311 (9th Cir. 1982).

13 Here, the Court finds that the circumstances of this case allow Defendant to renew its  
14 original summary judgment and seek dismissal of Plaintiff’s remaining “prolongation of pain”  
15 claim. As indicated above, Defendant moved for an order to stay the instant case on the  
16 grounds that an analogous case pending before the Ninth Circuit would determine the outcome  
17 of the instant case. The Court granted Defendant’s motion because Plaintiff did not oppose the  
18 motion. Consequently, to allow Plaintiff to now argue that Defendant is precluded from moving  
19 for summary judgment to dismiss Plaintiff’s “prolongation of pain” claim would completely  
20 undermine the only basis for the Court’s decision to enter the stay in the first place.  
21 Accordingly, the Court finds it justifiable to use its “inherent power to control its docket and  
22 promote efficient use of judicial resources” in order to extend the dispositive motion deadline in  
23 the instant case. *See Dependendable Highway Exp.*, 498 F.3d at 1066. As such, Defendant’s  
24 motion is ripe for review.

---

26  
27 <sup>2</sup> This Court itself previously extended the discovery deadline by *sua sponte* reopening discovery to  
28 allow Defendant to explore Plaintiff’s “prolongation of pain” claim. (Dkt. #21).

**D. The Court Shall Give Effect to Defendant's Unopposed Motion to Stay**

Defendant argues that summary judgment is appropriate because Plaintiff effectively agreed that *Baylor* would determine the outcome of this case by choosing not to oppose Defendant's motion to stay. The Court agrees. Both the local rules of this district court and well-established Ninth Circuit precedent establish that failing to oppose a motion is similar to agreeing that such motion has merit.

For example, the local rules of this district court provide that "[i]f a party fails to file papers in opposition to a motion, such failure may be considered by the court as *an admission that the motion has merit.*" Local Rule CR 7(b)(2) (emphasis added). The Ninth Circuit has likewise held that "a rule treating failure to file timely opposition as consent to a motion was valid[.]" *Bilbud Rancho California Ltd. v. Johnson & Johnson Dev. Corp.*, 86 F.3d 1161, 1996 WL 266446, at \*5 (9th Cir. 1996) (citing *United States v. Warren*, 601 F.2d 471 (9th Cir. 1979)). Ultimately, an unopposed motion is quite simply analogous to a stipulation. See *Fontilea v. Mukasey*, 2008 WL 1817975, at \*1 (9th Cir. April 23, 2008) (citing *Konstantinova v. INS*, 195 F.3d 528 (9th Cir. 1999)).

In this case, Defendant clearly stated in its motion to stay that "[t]he issues involved in the present matter and *Baylor* are nearly identical. As such, the Ninth Circuit's decision in *Baylor* will determine the outcome of this case." (Dkt. #22 at 2). Plaintiff unequivocally did not oppose Defendant's motion to stay. In fact, correspondence between the parties' attorneys reveals that Plaintiff's attorney agreed that *Baylor* would be outcome-determinative of the instant case. Specifically, Defendant's attorney sent Plaintiff's attorney a letter stating: "[s]ince the issue in [*Baylor*] is controlling on this one, I am wondering if you will stipulate to a stay in this proceeding until a decision in *Baylor* is handed down by the 9<sup>th</sup> Circuit." (Dkt. #23, Decl. of Heikkila, Ex. B). Plaintiff's attorney responded by indicating that "[w]ith respect to your continuance letter, very perceptive. Good idea too. You have our concurrence in stipulating to remedy discussed." (*Id.* Ex. C).

As a result, the Court finds that Plaintiff has agreed that *Baylor* - a decision favorable to

1 Defendant - determines the outcome of the instant case. The Court shall therefore give effect to  
2 the parties' agreement, and Plaintiff cannot now argue that *Baylor* does not control, when his  
3 opportunity to raise such an argument should have occurred in response to Defendant's motion  
4 to stay. Otherwise, and as Defendant indicates, allowing Plaintiff to make such an argument  
5 would be "an unnecessary waste of the parties' and this Court's time." (Dkt. #30 at 2). Thus,  
6 Plaintiff's "prolongation of pain" claim shall be dismissed on this ground.

7 **E. The Substance of the *Baylor* Decision**

8 In any event, the Court agrees with Defendant that the substance of the *Baylor*  
9 memorandum opinion by the Ninth Circuit operates to preclude Plaintiff's remaining  
10 "prolongation of pain" claim as a matter of law. As indicated above, the Ninth Circuit in *Baylor*  
11 affirmed a district court's summary judgment dismissal of a plaintiff's claim brought pursuant to  
12 the Jones Act. *See Baylor*, 2008 WL 636823, at \*1. Specifically, the court found that the  
13 plaintiff was not entitled to recover damages for pain and suffering allegedly caused by the  
14 defendant employer's failure to timely provide maintenance and cure for two reasons. First, the  
15 court held that the plaintiff was unable to produce any evidence that financial hardship impacted  
16 her mental state. *Id.* Second, the court held that the plaintiff was unable to provide any  
17 evidence that a delay in treatment had a negative effect on her prognosis. *Id.* In support of  
18 these holdings, the court found that although a doctor testified that a delay would likely cause a  
19 negative effect on the plaintiff's prognosis, there was no definitive proof to support the doctor's  
20 opinion. *Id.*

21 In addition, the Ninth Circuit found that the district court did not err in failing to  
22 recognize plaintiff's alleged "prolongation of pain" claim. The court indicated that "[b]oth the  
23 theory *Baylor* [the plaintiff] pled, and the responses she gave in discovery, focus on *aggravation*  
24 of the underlying condition caused by the delay." *Id.* (emphasis in original). Consequently, the  
25 court found the substance of plaintiff's claim was that the defendant employer did not timely  
26 provide maintenance and cure, rather than a "prolongation of pain" claim that the district court  
27 should have recognized. *Id.*

1 Similarly, in this case, Plaintiff has both raised a theory in his complaint and given  
2 responses in his discovery that focus on the aggravation of the underlying condition caused by  
3 the delay. Therefore in substance, Plaintiff's claim is not a "prolongation of pain" claim as  
4 indicated in his response to Defendant's original summary judgment motion, but a claim that his  
5 condition was aggravated and worsened as a result of Defendant's alleged negligence.  
6 Furthermore, Plaintiff has only offered his self-serving testimony and the speculative testimony  
7 of two doctors to support his position. Both doctors clearly did not offer any proof in support  
8 of their testimonies, only testifying that Plaintiff's injuries could have worsened over time. (Dkt.  
9 #18, Ex. 2 at 14:18-23; Ex. 3 at 17:13-17).<sup>3</sup> Thus, while the Court recognizes the need to  
10 exercise special care in Jones Act cases on summary judgment given the very low evidentiary  
11 threshold these types of case require, *see Leonard*, 581 F.2d at 524, the Ninth Circuit's holding  
12 in *Baylor* provides that speculative testimony of a doctor does not create a triable issue of fact.  
13 *See Baylor*, 2008 WL 636823, at \*1. Coupled with the well-established principle that self-  
14 serving testimony without evidence in support thereof is never sufficient to create a triable issue  
15 of fact, Plaintiff has failed to provide sufficient evidence to withstand summary judgment in the  
16 instant case.

17 To the extent that the Court's findings in this Order conflict with this Court's previous  
18 Order granting in part and denying in part Defendant's motion for summary judgment motion  
19 (Dkt. #21), any contradictory findings in that Order shall be vacated. An order denying  
20 summary judgment is an interlocutory decree, *see United States v. Florian*, 312 U.S. 656, 61  
21 S.Ct. 713 (1941), and accordingly a court in its discretion may reconsider such order. *See*  
22 *Nightlife Partners, Ltd. v. City of Beverly Hills*, 304 F.Supp. 2d 1208, 1214 (E.D. Cal. 1986)  
23 (citation omitted). Furthermore, it is proper for a lower court to set aside an interlocutory  
24 ruling that it has made to avoid subsequent reversal. *See Lindsay v. Dayton-Hudson Corp.*, 592

---

25  
26 <sup>3</sup> This Court previously quoted the specific deposition testimonies of both doctors in its previous  
27 Order on Defendant's summary judgment (Dkt. #21). Accordingly, the Court finds it unnecessary to set  
28 out the deposition testimonies here.

1 F.2d 1118, 1121 (10th Cir. 1979). Courts have generally permitted modification of the law of  
2 the case if subsequent, contradictory controlling authority exists. *See Fuhrman v. United States*  
3 *Steel Corp.*, 479 F.2d 489, 494 (6th Cir. 1973).

4 As a result, because *Baylor* provides that a doctor's speculative testimony is not  
5 sufficient to create a triable issue of fact, this Court shall set aside its previous interlocutory  
6 ruling that indicated otherwise. Thus, summary judgment in favor of Defendant is proper on  
7 this ground as well.

#### 8 **F. Defendant's Alternative Argument**

9 Because the Court has determined that summary judgment is proper for the two  
10 independent reasons mentioned above, it finds it unnecessary to discuss Defendant's alternative  
11 argument that a "prolongation of pain" claim is an element of damages and not an independent  
12 cause of action.

### 13 **III. CONCLUSION**

14 Having reviewed Defendant's motion, Plaintiff's response, Defendant's reply, the  
15 declarations and exhibits attached thereto, and the remainder of the record, the Court hereby  
16 finds and ORDERS:

17 (1) Defendant's motion for summary judgment (Dkt. #27) is GRANTED. This case  
18 shall be dismissed with prejudice.

19 (2) The Clerk is directed to send a copy of this Order to all counsel of record.  
20

21 DATED this 29<sup>th</sup> day of May, 2008.



23 RICARDO S. MARTINEZ  
24 UNITED STATES DISTRICT JUDGE